Supreme Court, U.S.
FILED

97 2 0 2 4 JUN 4 1998

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
SUSAN LEE FRIERSON,
Deputy Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
*ROBERT S. HENRY
Deputy Attorney General
*Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: 213 897-2257
Fax: 213 897-2263
Counsel for PETITIONER

(CAPITAL CASE)

QUESTION PRESENTED

1. IS THE RULING OF A DISTRICT COURT ON WHETHER A STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF HAS AUTHORIZED A HAEAS CORPUS PETITION SUBJECT TO THE "COLLATERAL ORDER" APPEAL DOCTRINE IN COHEN V. BENEFICIAL LOAN CORP., 337 U.S. 541 (1949)?

2. IS SUCH A PETITION AUTHORIZED UNDER 28 U.S.C. § 2242 WHERE THE PRISONER DISAVOWS IT?

LIST OF PARTIES

1. Arthur Calderon, Warden of the California State Prison at San Quentin, Petitioner.

2. Douglas Daniel Clark, Respondent.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	4
SUMMARY OF REASONS FOR GRANTING THE WRIT	8
ARGUMENT	11
I. AN ORDER DETERMINING WHETHER A STATE PRISONER HAS, UNDER 28 U.S.C. § 2242, "AUTHORIZED" A PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE APPEALABLE IMMEDIATELY	11
II. AN INDIGENT STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF BEING REPRESENTED BY STATUTORILY APPOINTED COUNSEL HAS FINAL AUTHORITY OVER THE CLAIMS RAISED IN AND EXCLUDED FROM HIS FEDERAL HABEAS CORPUS PETITION	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
Abney v. United States, 431 U.S. 651 (1977)	16
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	14
Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991)	11
Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)	16,18
Ford v. Lockhart, 861 F.Supp. 1447 (E.D. - Ark. 1994)	12
Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	13,14
Cohen V. Beneficial Loan Corp., 337 U.S. 541 (1949)	15
Jones v. Barnes, 463 U.S. 745 [103 S.Ct. 3308, 77 L.Ed.2d 987] (1983)	21
Mitchell v. Forsyth, 472 U.S. 511 (1985)	16

TABLE OF AUTHORITIES, CONT'D

Murray v. Carrier,
477 U.S. 527
[106 S.Ct. 2661, 91 L.Ed.2d 434] (1986) 17

Prate v. Freedman,
583 F.2d 42 (2nd Cir. 1978) 21

President of the United States,
Nixon v. Fitzgerald,
457 U.S. 731 (1982) 16

Puerto Rico Aqueduct & Sewer Authority
v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993) 16

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424 (1985) 17

Speech and Debate Clause,
Helstoski v. Meanor,
442 U.S. 500 (1979) 16

Stack v. Boyle,
342 U.S. 1 (1951) 16

Ex Parte Tom Tong,
108 U.S. 556 [2 S.Ct. 871, 27 L.Ed. 826] (1883) 21

United States v. McDonald,
435 U.S. 850 (1978) 16

TABLE OF AUTHORITIES, CONT'D

Statutes

21 U.S.C. § 848	21,22
28 U.S.C. § 1254	22
28 U.S.C. § 1291	13
28 U.S.C. § 2242	11,12
28 U.S.C. § 2254	12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

OPINION OR JUDGMENT BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, filed March 6, 1998, amending a January 22, 1998 Order denying and dismissing petitioner's collateral order appeal and otherwise denying petitioner's petition for rehearing. See Appendix[1/] A.

The original Order of the United States Court of Appeals for the Ninth Circuit, filed January 22, 1998, denying and dismissing the appeal. See Appendix B.

The Order of the United States District Court for the Central District of California, filed July 31, 1997, denying petitioner's motion to dismiss respondent's

---

1. The appendices are being filed concurrently under separate cover.

petition for writ of habeas corpus or, in the alternative, to compel full verification. See Appendix C.

STATEMENT OF JURISDICTION

The date of the Order which petitioner seeks to have reviewed is March 6, 1998. See Appendix A.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2242:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the application is held.

21 U.S.C. § 848(q)(4)(B):

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Respondent Douglas Daniel Clark, hereinafter Clark, a death row inmate in the custody of petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, hereinafter the Warden, was convicted on March 16, 1983, in a California state court by a Los Angeles County jury of the first-degree murders of six women in a series of killings that became known as the "Sunset slayings." The jury fixed the penalty at death.

On July 30, 1992, the California Supreme Court affirmed the judgment and death penalty. This court denied certiorari on March 22, 1993.

Clark requested appointment of counsel on November 3, 1992 and counsel was appointed on February 7, 1994 by United States District Court Judge Robert M. Takasugi. On April 23, 1997, appointed counsel filed, purportedly on Clark's behalf, a petition for writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 (see Appendix D), seeking to overturn his convictions and death sentences based on 27 different claims for relief.

The petition bore what purported to be Clark's signature. However, as part of the petition, the then-appointed counsel for Clark alleged that counsel himself, instead of Clark personally, had verified claims sixteen through twenty seven because, "At this time, [Clark] is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief." There appeared to be some question as to whether Clark's signature had been attached to a version of the petition which he had not seen and 1) which contained a different version of claims one through fifteen, to which he

had consented, and 2) to which was reattached claims sixteen through twenty seven, which Clark had ordered his counsel to remove from the original petition he had been shown when he signed the verification page.

On May 21, 1997, the Warden filed a "Notice of Motion and Motion to Dismiss Petition as Unauthorized, or, in the Alternative to Compel Full Verification by [Clark]." See Appendix E. In his motion, the Warden contended that the petition had openly heralded the fact that it was not personally authorized by Clark and that Clark himself should therefore be compelled either to verify it personally, it should be dismissed, or Clark should verify and counsel should file a new petition upon which he and counsel both could agree.

Clark, who by this time had been granted permission by the district court judge to file documents *in propria persona* on the authorization question, filed a document on June 10, 1997, in the district court entitled "Notice of [Clark's] Objection to Continued Representation by Appointed Counsel," (see Appendix F), and another document on June 30, 1997, entitled, "Actual Opposition to Fukioja's Perjurious Documents Filed 4-23-97 and 6-16-97" (see Appendix G). In these documents, particularly the latter, Clark stated that he was expressly disavowing the petition.

Clark's then-appointed counsel, on June 16, 1997, then filed a document entitled, "Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix H) arguing therein that Clark's verification of some of the claims in the petition sufficed to authorize all of the claims in the petition.

The Warden then, on June 23, 1997, filed its "Reply to Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix I) arguing that the state of the record, including Clark's *in propria persona* after-the-fact denunciations of the petition and the inclusion of the claims contained therein against his express wishes rendered the petition unauthorized and thus left the district court without jurisdiction to proceed thereupon.

On July 7, 1997, Clark, *in propria persona*, filed a letter (see Appendix J) criticizing both his counsel and the Warden's reply.

On July 30, 1997, the district court issued two orders. One order was entitled, "Order Granting Request to Discharge Current Counsel and Appointing Manuel Araujo as Counsel for [Clark]" (see Appendix K), and the other order was entitled, "Order Denying Motion to Dismiss Petition and Alternative Motion to Compel Full Verification by [Clark]," (see Appendix C).

In the latter order, the district court held that:

> [Clark's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler.

On August 27, 1997, the Warden filed a "collateral order" notice of appeal challenging the aforementioned order. See Appendix L. On September 11, 1997, the Warden filed a petition for writ of mandate and/or prohibition challenging the same order. See Appendix M. On October 1, 1997, the Warden filed a motion to consolidate the two cases (see Appendix N) and on October 21, 1997, the Ninth Circuit issued an Order

granting the consolidation of the two cases (see Appendix O).

On November 12, 1997, the Ninth Circuit Court of Appeals issued an order of denying the petition for writ of mandate/prohibition. See Appendix P. The Order in question read:

> The Petitioner's Application for Stay of the District Court Proceedings is DENIED. The petition for writ of mandamus and/or prohibition is also DENIED.

On January 22, 1998, the Ninth Circuit issued an Order (Appendix B) stating:

> The State's appeal based on the district court's collateral order is denied. The State submitted only a statement of issues and representation statement. This fails to comply with FRAP 28(a). We therefore dismiss the appeal. N/S Corp. v. Liberty Mutual Insurance Co., 127 F.3d 1145 (9th Cir. 1997). Emphasis added.

On or about February 5, 1998, the Warden filed a petition for rehearing pursuant to FRAP 40. See Appendix Q. Therein, inter alia, the Warden argued that either the Ninth Circuit was unaware that this was a death penalty case and, under local Ninth Circuit rules, the briefing schedule for such cases are set by the Court and no briefing schedule had been set, explaining why the Warden had filed no brief, or, on the other hand, the Ninth Circuit had denied the Warden's right to an appeal by deciding the case without allowing the Warden the right to brief the issue and then denying relief on the grounds that a brief had not been filed.

On March 6, 1998, the Ninth Circuit issued the Order (see Appendix A) from which this certiorari petition is taken which read:

> This Court's Order, filed January 22, 1998, is amended by substituting the following:
>
> The State's collateral order appeal is DISMISSED pursuant to Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546-47 (1949). We hold that briefs are not necessary to our decision.
>
> With this amendment made, the State's petition for rehearing is DENIED.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Warden urges that a writ of certiorari should be granted because the United States Court of Appeal for the Ninth Circuit has decided an important question of federal law of first impression that has not been, but should be, settled by this Court, i.e., that a decision by a district court that a petition for writ of habeas corpus has been authorized by a state prisoner is not subject to the "collateral order appeal" doctrine.

This High Court has never explicitly ruled that a petition for writ of habeas corpus by an indigent state prisoner must be authorized. The Ninth Circuit, and one district court in the Eighth Circuit at least, have ruled that if a first petition for writ of habeas corpus is retroactively deemed to have been "unauthorized," the state prisoner is allowed to start all over again with what would otherwise be a "second successive" petition. The States thus risk expending years of litigation defending against petitions that could potentially be declared null and void by a subsequent federal court.

Under 28 U.S.C. § 2242, every petition for writ of habeas corpus filed by a person in state custody must be "signed and verified" by the person on whose behalf relief is sought. In the instant case, the statutorily appointed counsel for the indigent inmate respondent here filed a petition that included numerous claims that the prisoner objected to and attached thereto the prisoner's verification which had been signed on an unnumbered page. When the Warden pointed out that the petition admitted that it lacked Clark's verification as to numerous claims, Clark, who apparently demanded to see a copy of the version of the petition that had actually been filed, then disavowed the version of the petition filed on the ground that it contained numerous claims to which he objected.

However, the district court ruled Clark's (apparently earlier) verification of some claims sufficed to ensure his endorsement of the habeas action.

The Warden appealed but the Ninth Circuit, either 1) expressly refused to review the issue, finding it not to be a proper one for a "collateral order appeal," or 2) summarily decided that the district court's order was correct as a matter of law.

If the Ninth Circuit's Order constituted a refusal to review the district court order, the issue here is whether the ruling of a district court that a petition for writ of habeas corpus is authorized is a ruling which should be reviewed prior to the expenditure of years of litigation. A ruling on the authorization of a petition is one which 1) is of overriding importance to the litigation, 2) does not involve the merits of the litigation, and 3) for all practical purposes is unreviewable on appeal.

On the other hand, if the Ninth Circuit's order was a ruling on the merits of the appeal, then the issue, i.e., to what extent does an indigent state prisoner being represented by appointed counsel have the right to control the claims asserted in his petition, is momentous and also a question of first impression.

ARGUMENT

I.

AN ORDER DETERMINING WHETHER A STATE PRISONER HAS, UNDER 28 U.S.C. § 2242, "AUTHORIZED" A PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE APPEALABLE IMMEDIATELY

At issue is whether the States can, without awaiting final judgment and appeal, challenge a habeas corpus petition as unauthorized. A State has an interest in the question because if it is forced into lengthy litigation on a petition, and that petition is subsequently declared null and void as being not authorized by the prisoner, the State may have to litigate a new petition, presumably one legitimately authorized by the prisoner.

This is what occurred in the case of Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991), where, on three separate occasions, the United States Supreme Court reversed the Ninth Circuit's own reversals of a death judgment. In all three instances, this Court had held that relief could not be granted the inmate because the petition was a second and therefore successive one. After the last reversal, however, the inmate, for the first time, asserted that the petition was not a second or successive petition at all because he, the petitioner, had never "authorized" the first petition. The Ninth Circuit agreed, noting that the counsel had never actually shown the petition to the inmate, and the State was forced to start the whole process again from the beginning and defend a new petition. Deutscher was dutifully followed in the

Eighth Circuit district court case of Ford v. Lockhart, 861 F. Supp. 1447, 1453 (E.D.-Ark. 1994).

It is clear that a state prisoner must consent to any petition for federal habeas corpus relief filed in his behalf. 28 U.S.C. § 2242 provides that:

> Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

In the instant case, the facts are simple. Clark, an indigent state prisoner under conviction and sentence of death, demanded that the petition filed on his behalf under 28 U.S.C. §2254 contain certain claims and exclude others. Against his wishes, his appointed counsel instead attached Clark's verification to a different version of the petition that changed the claims Clark wanted included and also included claims he wanted excluded. See Appendix D. When the Warden, Petitioner here, protested that the petition was unauthorized, raising the specter that any judgment obtained would be invalid, the state prisoner, then apparently alerted to the changes for the first time, agreed with the Warden and filed documents in the district court disavowing the whole petition. See Appendix G.

The Warden moved to dismiss the petition as unauthorized or, in the alternative, to compel the prisoner and his counsel to agree upon the contents of a single unified petition. See Appendix E. However, the district court ruled that Clark's apparent consent to some claims contained in the petition was sufficient to authorize the whole petition, even though Clark objected to the inclusion of other parts of the petition and disavowed the

whole petition because of the inclusion of the latter claims. See Appendix C.

The portion of Cohen to which the Ninth Circuit's Order (from which this certiorari petition is taken) cites decries appellate intervention as to district court orders that 1) pertain to matters that remain "open, unfinished or inconclusive, and 2) "are but steps towards final judgment [on the merits] in which they will merge." Id. However, as will be shown below, the appeal here violates neither of these two cautions.

It is clear that the appellate courts have jurisdiction over appeals "from all final decisions of the district courts." 28 U.S.C. § 1291. A final decision is typically one which ends the litigation on the merits. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988). Although the order of the district court below denying the dismissal of the petition as unauthorized is obviously not a "final decision" in that sense, the Warden submits that it still qualifies for immediate appeal under what is sometimes called the "collateral order" exception to the final judgment requirement of 28 U.S.C. § 1291.

In Cohen, following the language apparently cited by the Ninth Circuit, the Supreme Court held that there are "a small class of decisions" which are appealable under 28 U.S.C. § 1291 even though they do not end the underlying litigation if they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Ibid.

In later decisions, the Supreme Court has articulated a three-pronged test to determine whether an order is appealable under the collateral order doctrine:

> First, the order must "conclusively determine the disputed question." Coopers & Lybrand v. Livesay, 437 U.S. [463,] 468 [(1978)]. Second, the order must "resolve an important issue completely separate from the merits of the action." Ibid. Third and finally, the order must be "effectively unreviewable on appeal from a final judgment." Ibid. (footnote omitted).

Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. at 276.

Despite the citation in the Ninth Circuit's Order to pages 546 and 547 of the Cohen opinion, the district court's action regarding whether Clark "authorized" the petition does not leave the matter of authorization "open, unfinished, or inconclusive." It clearly and conclusively allows the petition to proceed to final judgment "as is." The language of the district court order is not, by its terms, tentative. It clearly states that:

> [Clark's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler. Appendix C.

Certainly, the question of authorization can be reviewed on appeal after final judgment. However, it is not the ultimate appealability of the decision considered for collateral appeal that was addressed by the language in Cohen disdaining intervention in the district court's exercise of power that leaves matters "open, unfinished, or inconclusive." There, instead, this High Court referred to

disdaining intervention into any action which the district court itself has not finally resolved, such as where the district court's decision is "tentative, informal or incomplete." 337 U.S. at 546. As such, Cohen did not mean to indicate, as the Ninth Circuit has apparently misinterpreted it, that where the aggrieved party has a right to review of the issue on appeal, the collateral order appeal doctrine will not lie.

As stated above, the second caution contained in the portion of Cohen cited by the Order (from which this certiorari petition is taken) warns against intervention in matters that are "but steps towards final judgment [on the merits] in which they will merge." Id. The district court's decision that the petition is authorized, being separate and apart from the merits, still can be challenged on appeal. Indeed, the appeal in Deutscher, cited above, was taken from the district court's ruling that the prior petition had not been authorized. As such, the authorization issue will not "merge" into the final judgment.

Next, the issue here -- whether the petition is authorized and thus valid instead of being potentially null and void -- is extremely important apart from the merits of the petition. In fact, the decision could be reviewed on appeal from the final judgment although, for all practical purposes, any victory resulting from that review would be Pyrrhic. There can be no question that forcing a State to await a final judgment granting or denying the writ before seeking appellate review of the validity of the authorization of the petition would render the decision of the district court on the authorization question here "*effectively*" unreviewable. The Warden emphasizes the word "effectively" because Cohen, by using the word "effectively" in the sentence "too late effectively to review the present order," meant that the remedy must be real and not illusory. Id.

The third Cohen prong, the reviewability of the Order in question, cannot be properly analyzed "without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 878-79 (1994).

Applying that test, this Court has found appealable a violation of a criminal defendant's statutory and constitutional right to bail, Stack v. Boyle, 342 U.S. 1 (1951); an adverse ruling on a double jeopardy claim, Abney v. United States, 431 U.S. 651 (1977); an order denying immunity under the Speech and Debate Clause, Helstoski v. Meanor, 442 U.S. 500 (1979); a decision denying a civil defendant's motion to dismiss based upon absolute immunity from suit for civil damages arising from actions taken while he was President of the United States, Nixon v. Fitzgerald, 457 U.S. 731 (1982); and a ruling denying governmental officials qualified immunity from damages suits, Mitchell v. Forsyth, 472 U.S. 511 (1985).

In the situations in which collateral order appeals were taken up, this Court found compelling the fact that "each involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial." United States v. McDonald, 435 U.S. 850, 860 (1978) (footnote omitted); See also Puerto Rico Aqueduct & Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139, 147 (1993) (State's Eleventh Amendment immunity from suit in federal court may be vindicated by immediate appeal under collateral order doctrine).

The Warden submits that the right involved here -- the State's right to not be subjected to "unauthorized" habeas proceedings is merely the "flip side" of what the "double jeopardy" protection is to the criminal defendant. The criminal defendant has a simple right not to be

subjected to another trial at which he risks either punishment, if the first trial ended in acquittal, or additional punishment if it ended in conviction. Allowing him to appeal an adverse ruling on a "once in jeopardy" claim is not an adequate vindication of that constitutional right. Obviously, the defendant has an emotional as well as a liberty interest in not being forced to undergo an entire trial and appeal in order to have this right vindicated. It is simply not enough to rely on the fact that he can raise the jeopardy issue on appeal.

The mirror image of this claim is the State's right here. Here, there has been a conviction that has been upheld on appeal and is now final. In light of "the profound societal costs that attend the exercise of habeas jurisdiction," Murray v. Carrier, 477 U.S. 527, 539, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the State, seeking legal security in the finality of that conviction, has a right to demand that it not be forced to undergo useless federal habeas litigation simply because the Order is technically reviewable on appeal. It is the very delay in the execution of the State's laws which can be likened to forcing a defendant to undergo repeated trials and awaiting appeal for vindication. The costs occasioned by the delay to the deterrent effect of the penalty imposed are the same.

The State's right not to be forced to litigate an unauthorized habeas petition with its attendant delay -- would likewise be "irretrievably lost," see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985), if this matter were allowed to go forward without immediate review of the district court's order.

Because an unauthorized habeas petition may later be potentially considered to be void by a federal court, as in Deutscher, and, because "[a] fully litigated case can no more be untried than the law's proverbial bell

can be unrung," Digital Equip. Corp., 511 U.S. at 872, it is clear that a delayed appeal will not vindicate the Warden's rights.

In light of the foregoing, the simple fact is that, far from being a "remedy," a later determination on appeal, after years of wasted litigation, that the petition was unauthorized and all previous proceedings were for naught is what a collateral order appeal here seeks to avoid. In that event, the Warden will have already suffered the harm that the litigation here is designed to forestall, i.e., expending time and resources on litigation whose very legitimacy is in question. Thus, a later appeal from the judgment is not an "effective" remedy even if it does result in a declaration that the petition was unauthorized.

The question that might present itself is whether the authorization issue is one that will be mooted by the judgment, never ultimately helping or hurting anyone. However, such a question fails to take into account the inmate himself. Like the inmate in Deutsher, Clark personally could always challenge a petition as being unauthorized if it suited his purpose.

Obviously, if the writ were granted, the inmate would not challenge the validity of the petition. If, however, the writ were denied, or if a grant of the petition were overturned on appeal or on certiorari review, the inmate, as in Deutscher, could attempt to raise the authorization question anew by filing a new petition.

As such, the inmate would have the "best of both worlds" while the order of the district court would be "effectively unreviewable." This being true, the third requirement of Cohen, the absence of availability of realistic relief on appeal, is satisfied here.

It is clear the authorization issue is an overriding question in this litigation. It is completely separate and apart from the merits so that the appellate court cannot be said to be interfering with the district court's right to determine those issues in the first instance. Lastly, given the fact that all subsequent litigation will be wasted if the order is incorrect, this case presents the optimum one for application of the collateral order appeal doctrine.

II.

AN INDIGENT STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF BEING REPRESENTED BY STATUTORILY APPOINTED COUNSEL HAS FINAL AUTHORITY OVER THE CLAIMS RAISED IN AND EXCLUDED FROM HIS FEDERAL HABEAS CORPUS PETITION

The question here[2/] is whether, for purposes of deciding if a federal court has jurisdiction over a habeas corpus petition filed against the wishes of the petitioner, a dispute between an appointed attorney and the petitioner as to what claims to assert is to be treated as would a dispute of this sort between an attorney and a client in an ordinary civil action.

In civil cases, the rule disposing of attorney-client disputes as to the conduct of the litigation is simple and clear. "In our legal system, an attorney is his client's agent and representative; the client retains ultimate authority

---

2. At the time of the issuance of the Order at issue here, the Ninth Circuit had already denied the Warden's mandamus petition in this same "consolidated" action. See App. P. This being true, the Order, which stated that briefs were not necessary to the decision of the Ninth Circuit, is susceptible to the interpretation that, in view of the mandamus briefing provided by the parties, which the Ninth Circuit already presumably had fully considered, further briefing was unnecessary to its decision. This would suggest the collateral order appeal was denied on its merits, and that the Ninth Circuit upheld the decision of the district court that a prisoner's consent to "some of" the claims in the petition was effective to authorize the petition as a whole. The Warden submits that this ruling must be reviewed by way of certiorari for the reasons set forth here.

over the conduct of litigation. See ABA Code of Professional Responsibility EC 7-7 ('In certain areas of legal representation not affecting the merits of the case or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.')." Prate v. Freedman, 583 F.2d 42, 48 (2nd Cir. 1978)

As such, in civil litigation, a client has total control over 1) whether to file, and 2) the selection of claims asserted in the litigation. The counsel is a mere voice through which the client speaks. Although the attorney may bind the client by his actions, it is clear that in a dispute between the two the client prevails. It is only by virtue of the client's inclination to pursue litigation that the attorney-client relationship exists at all. If she does not decide as a plaintiff to sue, there is no suit. Similarly, should she decide as a defendant not to defend, similarly, there is no defense.

However, with respect to criminal litigation, the attorney has considerably more "say" in the conduct of the litigation. Jones v. Barnes, 463 U.S. 745, 750-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The question is, therefore, whether the relationship between an indigent state prisoner pursuing federal habeas relief and his counsel who is appointed for him pursuant to 21 U.S.C. § 848(q)(4)(B) is more like that between civil attorney and client or criminal defendant and counsel.

The Warden submits that the ancient case of Ex Parte Tom Tong, 108 U.S. 556, 559-60, 2 S. Ct. 871, 27 L. Ed. 826 (1883), suggest the answer when this Court noted, in habeas corpus actions, as in civil actions, the client must commence the litigation in order for it to exist. Any

prisoner under restraint is perfectly entitled to serve his sentence, even after appeal, without resort to the writ. The State does not commence the process and nothing compels the prisoner to take advantage of the writ.

The fact that this is a death penalty habeas corpus action does not alter the result. Although 21 U.S.C. § 848(q)(4)(B) provides that an indigent state prisoner can have counsel appointed for him, nothing compels the state prisoner to request counsel. He could easily file, and act as his own counsel in, a petition for writ of habeas corpus just as do thousands of state prisoners not under a sentence of death.

Nor does the existence of 21 U.S.C. § 848(q)(4)(B) lead to the conclusion that indigent habeas petitioners who have counsel appointed under such circumstances wield less power than do habeas petitioners who litigate their own cases. 21 U.S.C. § 848(q)(4)(B) simply provides:

> In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

It is clear that the statute merely provides counsel for those who wish to take advantage of it and imposes no restrictions or obligations on those who avail themselves of the services offered. Of course, prisoners are entitled to rely entirely on their counsel's judgment for

the conduct of the litigation if they so choose. However, it does not logically follow that if a habeas petitioner takes advantage of a benefit offered to him by the government, he is somehow less in control of the litigation or that the nature of the entire proceedings is changed from civil to criminal. Unless this Court rules otherwise at this point in time, the habeas prisoner is still in charge of as much of the litigation as he chooses to control. Particularly as in regards to the petition, which, like the civil complaint, is the pleading that commences and defines the contours of the litigation, he may insist that the most minute detail of the pleading satisfy his slightest whim.

In light of the foregoing, the district court clearly erred in holding that it could proceed in litigating the petition on the basis of the prisoner's prior approval of only some claims in the petition, when the state prisoner had subsequently disavowed the whole petition, and, at least, vehemently objected to the inclusion of certain claims contained in the petition. Likewise, the Ninth Circuit Court of Appeals clearly erred in summarily holding that the collateral order appeal should have been dismissed.

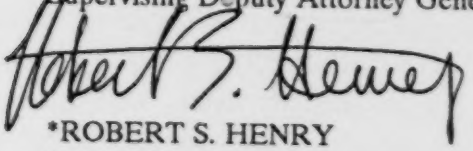
CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: June 3, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
SUSAN LEE FRIERSON,
Deputy Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General



*ROBERT S. HENRY
Deputy Attorney General
*Counsel of Record

Counsel for PETITIONER

LA97XF0002